W.E. CARTER ET AL.

IBLA 87-770 Decided October 18, 1990

Appeal from a decision of the Office of Surface Mining Reclamation and Enforcement, refusing to take Federal enforcement action against a state regulatory agency in response to a citizen complaint. SMN 848-5029.

Reversed; inspection ordered.

1. Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice to State

   Where an Office of Surface Mining Reclamation and Enforcement finding that a state regulatory authority took appropriate action in response to a 10-day notice is contradicted by the record developed by the agency, the decision to deny Federal enforcement action is reversed and inspection ordered.

APPEARANCES: Sherry Brashear, Esq., Harlan, Kentucky, and Thomas J. FitzGerald, Esq., Frankfort, Kentucky, for appellants; Judith M. Stolfo, Esq., Office of the Field Solicitor, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

W.E. Carter, Imogene Carter, Wilfred Jones, Nancy Metcalfe, Jerry Metcalfe, and Vernon Marler appeal from an August 3, 1987, decision of the Assistant Director, Eastern Field Operations, Office of Surface Mining Reclamation and Enforcement (OSMRE), denying their request that OSMRE take oversight action in response to a citizen complaint that the Kentucky regulatory authority had issued a surface coal mining permit under circumstances requiring Federal enforcement action pursuant to 30 CFR 842.11(b)(1), 842.12, and 843.12(a)(2) (1986). OSMRE decided that the Kentucky Natural Resources and Environmental Protection Cabinet (Cabinet) acted appropriately in issuing coal mining permit No. 848-5029 to V&C Coal Company (V&C), and found that no Federal inspection and enforcement action was required under the circumstances presented by the complaint. Appellants had protested issuance of the permit to V&C under a provision of the Kentucky Administrative Regulations (KAR) that prohibits mining operations within 300 feet of occupied dwellings, subject to valid existing rights, unless affected residents waive their right to the 300-foot protective zone. Appellants are residents of Harlan County, Kentucky, and live on or

own property less than 300 feet from a road permitted to V&C in furtherance of a surface coal mining operation.

On June 30, 1983, V&C filed a permit application and published a notice of intention to mine in a local newspaper. The Carters, protested V&C's application. Concerning their protest, later joined by the other named appellants, Cabinet held a series of permit conferences on October 17, 1983, July 22, and November 11, 1985, at which V&C sought to establish that the road had been used to haul coal prior to August 3, 1977, and was otherwise subject to valid existing rights.

On July 9, 1986, a hearing was held on appellants' complaint before a hearing officer appointed by Cabinet. On July 14, 1986, acting in response to a citizen's complaint filed the previous May by appellants that the road had been permitted in violation of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), OSMRE issued a 10-day notice (TDN) to Cabinet in accordance with SMCRA section 521(a)(1), 30 U.S.C. § 1271(a)(1) (1988).
No written response to the notice was received by OSMRE from Cabinet within 10 days. Nonetheless, OSMRE notified appellants on August 19, 1986, that it intended to suspend further investigation of their complaint until the pending hearing before Cabinet was concluded. 1/

On April 8, 1987, Cabinet's hearing officer issued a decision, finding, pertinently:

> The central issue presented in this matter is whether the road in question * * * met the requirements of 405 KAR 7:090, Section 1(4) at the time the permit was issued so as to exclude the road from the "affected area" connected with Permit No. 848-5029 issued to V&C Coal Company, Inc. over the objections of [appellants].
>
> In pertinent part 405 KAR 7:020, section 1(4) states as follows:
>
> > The affected area shall include every road used for the purposes of access to, or for hauling coal to or from, surface coal mining and reclamation operations, unless the road:
> >
> > (a) Was designated as a public road pursuant to the laws of the jurisdiction in which it is located;
> >
> > (b) Is maintained with public funds, and constructed in a manner similar to other public roads of the same classification within the jurisdiction; and
> >
> > (c) There is substantial (more than incidental) public use.

1/ Although there was no written communication from Cabinet to OSMRE about the hearing, there was obviously some contact. When this occurred is not recorded. Neither the statute nor regulation require a state response to a TDN to be written.

[Appellants] contend that none of the three requirements listed above were met for the road in question and that the road must, therefore, be included in the "affected area." This would mean that V&C Coal Company, Inc. would be required to obtain waivers from all persons owning occupied dwellings within three hundred (300) feet of the road in order to obtain their permit.

* * * * * * *

The road was not designated as a public roadway at the time the application was first filed on June 30, 1983. The road was, however, deeded to the Harlan County Fiscal Court on July 13, 1984, but the Harlan County Fiscal Court did not adopt a resolution accepting the road into the county road system until July 25, 1985.

Concerning the maintenance of the road with public funds, there was one expenditure of public funds on the road by the Harlan County Fiscal Court for blacktopping in August, 1984, in the amount of $7,114.36. That expenditure came after several denials of the permit sought by V&C Coal Company, Inc. and the expenditure came before the road was accepted into the county road system by the Fiscal Court.

As to the substantial public use of the road, Mr. Robert Salyers, Section Supervisor of the Engineering Support Section
in the Technical Review Branch of the Division of Permits, testified that when the permit in question was issued, he and Mr. Nickel, who assisted Mr. Salyers in deciding whether to issue the permit, based their decision as to substantial public use of the road on the proposed subdivision at the end of Section B
of the road and future anticipated use of the road due to the proposed subdivision.

According to the testimony of Dr. Wilfred Jones, Jr., a
gate was maintained across the lower end of the road from 1980 until August 24, 1984, the day before the road was blacktopped
by Harlan County. The gate remained across the road even after the road was deeded to Harlan County on July 13, 1984.

When the permit application was first filed, no one lived on the road. In 1984 one family moved into a home on the road and in January, 1986, another family moved into a home on the road.

In April, 1986, Dr. Jones observed the vehicular traffic on the road during sixty-four (64) hours and when the traffic going to the mine site is excluded, only fifty-six (56) vehicles used the road in question, which is less than one vehicle per hour on an average.

Moreover, in the initial permit application submitted by Defendants, the road was described as a "lightly-traveled road."

* * * * * * *

> The road in question does not meet the requirements of 405 KAR 7:020, Section 1(4) as to the maintenance with public funds and substantial public use so as to exempt the road from the definition of "affected area."
>
> The Harlan County Fiscal Court made one expenditure of funds on the road and this expenditure took place before the road was adopted as part of the county road system. A one-time expenditure of funds on a road cannot constitute maintenance since maintenance contemplates a continuing program of work to keep a road up to proper standards.
>
> Moreover, there was no proof introduced at the hearing tending to indicate that the road in question has ever enjoyed substantial public use. To the contrary, the testimony established that the public use of the road was restricted because the road does not connect to another road but rather dead ends at a proposed subdivision. Furthermore, the testimony established that the road was used only slightly and almost exclusively by three families either living on the road or building a home on the road. Moreover, until August, 1984, the road was blocked by a locked gate. Mr. Salyers testified, in fact, that the decision to issue the permit was based not upon present use of the road but upon future anticipated use of the road due to a future anticipated subdivision development.
>
> The regulation in question states that the road can be excepted from the affected area if there is substantial public use of the road among other requirements. It does not in any way indicate that future anticipated use of the road can be used to meet this requirement. [Emphasis in original.]

(Findings, Conclusions, and Recommendations filed Apr. 8, 1987, at 1-5).

The hearing officer recommended that Cabinet reverse approval of the V&C permit, which she found had been improperly issued. On April 30, 1987, however, the Secretary of Cabinet, without explanation, entered an order approving V&C's permit, contrary to the hearing officer's decision. 2/

By letter dated May 5, 1987, appellants notified the Lexington Field Office of OSMRE that the hearing officer's decision had not been enforced by the Cabinet Secretary, and requested OSMRE to "resurrect the ten-day

2/ The complete order reads:

"After consideration of the Hearing Officer's Findings, Conclusions, and Recommendations, and the Exceptions filed thereto, and after being fully and sufficiently advised,

"IT IS HEREBY ORDERED AND ADJUDGED:

"1. That Permit No. 848-5029 issued to V&C Coal, Inc., was properly issued and approval of the permit is hereby affirmed.

"2. This is a final Order.

"Entered this the 30th day of Apr., 1987."

notice and take action to enforce the mining laws." OSMRE declined to do so on June 25, 1987, stating that it "does not believe we have sufficient cause to overrule the State determination and proposes no further Federal action." Informal review of OSMRE's refusal to order an inspection was requested by appellants on July 24, 1987. See 30 CFR 842.15. As stated above, by decision of the Assistant Director, Eastern Field Operations, dated August 3, 1987, OSMRE replied: "Based upon all available information, OSMRE concludes that DSMRE (the State Regulatory Authority) acted appropriately in this case. Therefore, no Federal enforcement action by OSMRE is required."

In defense of this decision, OSMRE contends that action by a field office Director is action by the Secretary and urges that the decision should be accorded great deference, citing Udall v. Tallman, 85 S. Ct. 792 (1965); Hazel King, 96 IBLA 216, 94 I.D. 89 (1987), and Donald St. Clair, 77 IBLA 283, 90 I.D. 496 (1983). OSMRE also argues that the legal issues raised by appellants about the status of the road were actively litigated before Cabinet. Therefore, "[i]n reviewing the Cabinet's decision, OSMRE must determine whether or not the decision reached by the Cabinet was supported by the evidence and that the action taken by the Cabinet was appropriate" (Statement of Reasons at 3-4). OSMRE concludes that these conditions were met, and that therefore OSMRE" acted reasonably in not taking enforcement action." Id. at 4.

[1] Congress intended that the Secretary ensure compliance with SMCRA after primary responsibility for enforcement had passed to individual states (the permanent program), although some action may have been taken by state regulatory authority. A continuing Federal oversight role during the permanent program was foreseen by the lawmakers, who explained:

> The Federal enforcement system contained in this section, while predicated upon the States taking the lead with respect to program enforcement, at the same time provides sufficient Federal backup to reinforce and strengthen State regulation as necessary. Federal standards are to be enforced by the Secretary on a mine-by-mine basis for all or part of the State as necessary without a finding that the State regulatory program should be superseded by a Federal permit and enforcement program.

S. Rep. No. 128, 95th Cong., 1st Sess. 88 (1977). See Annaco, Inc. v. Hodel, 675 F. Supp. 1052, 1056-57 (E.D. Ky. 1987). Consistent with this approach, this Board has found that a pending state administrative proceeding does not bar exercise of Federal oversight authority during the permanent program. See Bernos Coal Co. v. OSMRE, 97 IBLA 285, 94 I.D. 181 (1987), rev'd on other grounds, Bernos Coal Co. v. Lujan, No. CIV-3-87-437 (E.D. Tenn., June 6, 1989), where we held:

> Under [30 U.S.C. § 1271(a)(1) (1982)], when OSM[RE] inspects a surface coal mining operation located in a primacy state and discovers a violation, OSM[RE] must give notice to the state regulatory authority. See 30 CFR 843.12(a)(2). Whether OSM[RE] need take further action depends upon whether the state's response constitutes appropriate action. OSM[RE] determines whether the

> action taken is appropriate; such action must be calculated to secure abatement of the violation.

Id. 97 IBLA at 301, 94 I.D. at 190.

The failure of Departmental regulations to define the term "appropriate action" was intentional. Turner Brothers, Inc. v. OSMRE, 92 IBLA 320, 323 (1986); Thomas J. FitzGerald, 88 IBLA 24, 29 (1985). In response to a comment received during rulemaking for 30 CFR 842.11(b)(1)(ii)(B) (1986), OSMRE responded that "OSM[RE] also disagrees with the suggestion that [the phrase] "appropriate action" should be spelled out in greater detail. The crucial response of a State is to take whatever enforcement action is necessary to secure abatement of the violation." 47 FR 35627-28 (Aug. 16, 1982); Turner Brothers, Inc. v. OSMRE, supra; Thomas J. FitzGerald, supra. 3/ OSMRE must, therefore, exercise discretion when required to decide whether a state response to a TDN is appropriate. Turner Brothers, Inc. v. OSMRE, supra.

Consequently, to determine whether Cabinet's action was appropriate in the instant case, OSMRE must consider available information, including the Cabinet proceedings. Turner Brothers, Inc. v. OSMRE, 99 IBLA 87, 92 (1987). The OSMRE decision was made after Cabinet's hearing officer's decision because OSMRE had delayed action on appellants' complaint in order to obtain evidence to be gathered at the State hearing. This delay by OSMRE to enable the State to pursue appellants' complaint was a proper use of the oversight power. See Donald St. Clair, supra.

If, on the record developed, OSMRE could then determine that the State was correct in finding that no violation existed, there would be no obligation to order an inspection. 30 U.S.C. § 1271(a)(1) (1982). However, if OSMRE discovered it could not determine whether a violation existed without an inspection, one should have been ordered. Only in cases where it has been shown that there has been no violation of SMCRA can a state regulatory agency be said to have shown good cause for failure to take action in response to a TDN. Peabody Coal Co., 101 IBLA 167, 173 (1988). The record developed at the State hearing indicated that there had been a violation of the permanent program rules. Consequently, OSMRE's finding that Federal inspection and enforcement action was unnecessary because Cabinet had taken appropriate action cannot be affirmed, because it is not consistent with available information.

The record made by Cabinet's hearing officer supports her finding that the permitted road did not qualify as a public road pursuant to 405 KAR 7:090, section 1(4) so as to exclude it from the "affected area" of permit No. 848-5029 issued to V&C. There was no evidence that, prior to permit issuance, the road received substantial public use or that the road was

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3/ We note that later rulemaking, not here relevant, took a somewhat different approach and characterized "appropriate action" as a "response by a State regulatory authority that is not arbitrary, capricious, or an abuse of discretion." 30 CFR 842.11(b)(1)(ii)(B)(2). 53 FR 26744 (July 14, 1988). Even were we to apply this amended rule to the facts of this case, the result of our decision would not change.

maintained with public funds. It was concluded from this that the road near appellants' property had been erroneously permitted because it was part of the "affected area" connected with the V&C operation. Had the Cabinet secretary implemented the hearing officer's recommendations, we would find that the action taken by the State was appropriate. The order entered by Cabinet, however, which is inconsistent with the findings of the hearing officer, is unsupported by the record on appeal and therefore cannot be "appropriate" action by Cabinet. We therefore find that, on the record before us, OSMRE was required to order an inspection.

The contention that Cabinet's action should be affirmed because the issue concerning V&C's road was actively litigated is without foundation. Active litigation, in and of itself, does not sustain a finding that the State regulatory agency acted appropriately. This Board has rejected the notion that if a state regulatory body has taken some action, no matter what, the action taken must have been appropriate. Thomas J. FitzGerald, supra at 88 IBLA 29 n.4; Turner Brothers v. OSMRE, 92 IBLA 320, 326 (1987).

Moreover, OSMRE was in no way hindered by suspension of Federal regulations at the time of issuance of the August 3, 1987, decision from carrying out oversight obligations imposed by SMCRA section 521(a)(1). Departmental regulation 30 CFR 842.11(b)(1)(i) (1986), implementing SMCRA section 521(a)(1), requires Federal inspection "[w]hen the authorized representative has reason to believe on the basis of information available * * * that there exists a violation of the Act, this chapter, the applicable program or any condition of a permit." (Emphasis supplied.) Kentucky had not suspended the definition of "affected area" in the State's permanent surface mining program at the times relevant to this appeal. Accordingly, OSMRE was bound to oversee enforcement of the State permanent program regulation defining "affected area," as that definition applied to the V&C permit. On the record developed by the State hearing examiner, an inspection was required to be made in furtherance of Federal oversight required by SMCRA.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and Federal inspection is ordered on remand.

Franklin D. Arness
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge